UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

In re:

MICHAEL DANIEL EARNEST,

Debtors.

_____/

CASE NO.: 11-50665-KKS

CHAPTER: 13

CONSTANCE DODSON,

Plaintiff,

v.

MICHAEL DANIEL EARNEST,

Defendant.

_____/

ADV. PRO. NO.: 12-05005-KKS

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM OPINION

This case involves the difficult and often emotional issue of whether certain marital obligations are dischargeable in bankruptcy. To decide the issue, this Court must determine the intent of the parties or, as in this case, the intent of the state court that made the award, based on the facts before it. Dischargeability of marital obligations must be decided on a case by case basis. The facts presented here center on the Debtor's obligations, both past and continuing, to pay half of the mortgage payments on the home where the Debtor's ex-wife continues to live with their two minor children. For the reasons more fully set forth below, the Court finds that the obligations the Debtor owes his ex-wife are non-dischargeable under 11 U.S.C. § 523(a)(5).

PROCEDURAL BACKGROUND

Constance Dodson (the "Plaintiff," or "Ms. Dodson"), is the former wife of the Defendant, Michael Daniel Earnest (the "Defendant," or the "Debtor") and is a creditor by virtue

of amounts that the Debtor owes her as a result of the dissolution of the parties' marriage.[1] The Debtor filed a voluntary Chapter 13 petition on December 29, 2011. Ms. Dodson filed a Complaint seeking a determination that the Debtor's obligations to pay (1) $30,730.57 to reimburse her for half of the mortgage payments that she paid during their separation, and (2) half of the monthly mortgage payments on the home beginning on June 1, 2010 (the first payment due after the dissolution) and continuing until the home is sold, are non-dischargeable in this Chapter 13 as being in the nature of alimony, maintenance, or support. In his Answer the Debtor denies these allegations and claims that the sums are dischargeable because they do not constitute a domestic support obligation as that term is defined in 11 U.S.C. § 101(14A), but rather constitute a "property settlement." (Doc. 6). The Debtor further asserts in an affirmative defense that this issue has previously been determined by the State Court. (Doc. 17). The Court denied the Debtor's Motion for Summary Judgment (Doc. 30) and conducted a trial on February 28, 2013.

FACTUAL BACKGROUND

The parties were married in 2005, and have two children together. When their youngest was only two months old, the Debtor left the marital home and moved into an apartment with his girlfriend and her child; at some point during the parties' separation the Debtor had a child with his "paramour." (Amended Final Judgment, Doc. 1-2 at 5). After the Debtor left the marital home, Ms. Dodson worked two jobs at times and paid all expenses related to the home and the children's daycare with no contribution from the Debtor. The Debtor filed the dissolution of marriage action on March 10, 2009, a little over two years after the parties separated. The original Final Judgment of Dissolution of Marriage was entered on May 12, 2010, after a contested evidentiary hearing at which the State Court heard testimony of the parties and their

[1] The dissolution was handled and the original and an amended final judgment were entered by the Circuit Court of the Fourteenth Judicial Circuit for Bay County, Florida (the "State Court").

witnesses; it is the original Final Judgment that determined the amounts due from the Defendant to Ms. Dodson. The Amended Final Judgment of Dissolution entered on April 4, 2011, did not change the awards at issue in this proceeding; it modified the Debtor's child support amount and dealt with income tax matters.

At the time of the dissolution in May of 2010 the marital home had negative equity, so the parties agreed to put it on the market and attempt a "short sale." In between the Debtor moving out and the final dissolution hearing, Ms. Dodson had paid a total of $61,461.14 toward the mortgage to prevent foreclosure of the home while she and the children lived there; the Debtor had paid nothing. Ms. Dodson and the parties' children stayed in this very home because after the couple divorced the Debtor successfully blocked her from moving with the children to Mississippi with her then-fiancé. (Doc. 19-1).

At the conclusion of the evidentiary hearing the State Court ordered the Debtor to reimburse Ms. Dodson half of the amount she had paid on the mortgage during the separation ($30,730.57), awarded continued, exclusive possession of the home to Ms. Dodson, and ordered each party to pay half of the mortgage payments from the dissolution (June 1, 2010) until the home was sold. The State Court found that the parties had comparable incomes at the time of the dissolution. Because it found that the Debtor had "received more debt than the Wife," the State Court denied Ms. Dodson's request for the Debtor to pay half of the children's daycare expenses for the twenty-two months of their separation and ordered Ms. Dodson to pay for the children's health insurance and all childcare expenses going forward. (Final Judgment, Doc. 25-1 at 6).[2] Each party retained an automobile with a loan on it, the Debtor retained the couple's boat with a loan on it, and Ms. Dodson retained the furniture and the loan on it. Finding that the couple's assets and liabilities, with the exception of the house, had been equitably divided by the parties, the State Court ordered:

[2] The assets the Debtor received were worth more as well.

> [I]t is equitable for the Wife to be reimbursed by the Husband for one-half (1/2) of all mortgage payments made by her since the separation, for a total of $30,730.57. The Husband should begin one-half (1/2) payment of the mortgage on June 1, 2010, and the Wife shall pay one-half (1/2) of the mortgage until the home is sold . . . . Upon sale of home, Husband shall continue to pay one-half (1/2) of mortgage payment directly to Wife until the entire sum of $30,730.57 is paid in full.

(Final Judgment, Doc. 25-1at 2-3; Amended Final Judgment, Doc. 1-2 at 3).

The State Court's award, set forth in the above language, is at the crux of the parties' dispute in this proceeding.[3]

DISCUSSION

Both parties agree that the Debtor's obligations to pay half of the home mortgage payments, both the past due sum of $30,730.57 and the payments from June 1, 2010, through the present, are marital obligations that would be non-dischargeable in a Chapter 7 under 11 U.S.C. § 523(a)(15). Because the Debtor filed a Chapter 13, the issue before the Court is whether the sums the Debtor owes Ms. Dodson constitute domestic support obligations that are in the nature of alimony, maintenance, or support under 11 U.S.C. § 523(a)(5), thus making them non-dischargeable in Chapter 13.

Section 1328(a) of the Bankruptcy Code provides a debtor in Chapter 13 a "super discharge" of some debts, including certain marital obligations that would otherwise be non-dischargeable in Chapter 7. *See* 11 U.S.C. §§ 1328(a), 523(a)(15). Section 1328 does not allow a debtor to discharge a marital obligation that is a "domestic support obligation" under § 523(a)(5). 11 U.S.C. § 1328(a)(2). A "domestic support obligation" is defined in § 101(14A) as one that is "*in the nature of* alimony, maintenance, or support…of such spouse, former spouse,

[3] The State Court did not award "alimony," stating that "[n]either have requested alimony nor should any alimony be awarded." (Amended Final Judgment, Doc. 1-2 at 3). The State Court ordered the Debtor to make monthly child support payments, the amount of which was increased in the Amended Final Judgment because the parties agreed that the original amount was not within the Florida child support guidelines. (Transcript of State Court Hearing, Doc. 20 at 16-20, December 19, 2010).

or child of the debtor…without regard to whether the debt is expressly so indicated." 11 U.S.C. § 101(14A) (emphasis added). The critical issue for this Court to decide is whether the Debtor's obligations, both past and ongoing, to pay half of the mortgage payments are "in the nature of" alimony, maintenance, or support.

"[C]ourts have ruled that exceptions from discharge for . . . spousal support deserve a liberal construction. . . ." *Pagels v. Pagels (In re Pagels),* Adv. No. 10-07070-SCS, 2011 WL 577337, at *9 (Bankr. E.D. Va. Feb. 9, 2011). Bankruptcy courts are not bound by labels placed on marital settlement awards in state court, so this Court must consider the substance of the State Court's ruling in order to determine whether the Debtor's obligations are "in the nature of" alimony, maintenance, or support. *See In re Wilbur,* 304 B.R. 521, 525-26 (Bankr. M.D. Fla. 2003). The Plaintiff has the burden of proof based on a preponderance of the evidence; the Court is to make a "simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the *nature* of support." *Harrell v. Sharp (In re Harrell),* 754 F.2d 902, 906 (11th Cir. 1985). One factor is whether the award "grossly favored" one spouse over the other or left one spouse with virtually no income. *Pagels*, 2011 WL 577337, at *10. Other factors include whether one spouse had custody of the minor children, the circumstances surrounding the dissolution ("the context in which the obligation arises" and "who was at fault in the marriage"), and whether the award served to provide basic necessities, such as "shelter." *Id.* at *9-11. The Eleventh Circuit has held that an "equitable distribution" by a state court can function as support. *See Cummings v. Cummings*, 244 F.3d 1263, 1266 (11th Cir. 2001) ("Although the divorce court labeled the [award] an 'equitable distribution,' the language used by the court suggests that it intended at least some portion of the equitable distribution to function as support"). "[A]ll evidence, direct or circumstantial," that tends to lead to subjective intent is relevant. *Id.* (quoting *In re Brody,* 3 F.3d 35, 38 (2d Cir. 1993)).

In *Cummings*, the Eleventh Circuit vacated a bankruptcy court's decision that a divorce court's "equitable distribution" of $6.3 million to the debtor's former wife was dischargeable as a "property settlement" that the debtor was unable to pay. *Cummings*, 244 F.3d at 1265. In vacating this ruling, the Eleventh Circuit held that the bankruptcy court should have examined the intent of the divorce court before making its ruling and remanded the case for a determination of what portion, if any, of the "equitable distribution" the divorce court intended as support for the wife. *Id.* at 1266-67.[4]

Following *Cummings* and focusing on the factors listed in the cited cases, this Court must discern the intent of the State Court as of the date it entered its original Final Judgment dissolving the marriage, awarding Ms. Dodson the $30,730.57, and ordering the Debtor to pay half of the monthly mortgage payments from June 1, 2010 through the sale of the home. Because the Amended Final Judgment did not change this award in favor of the Plaintiff, the focus at the trial and in this opinion is on the facts and proceedings leading up to and at the time of the original Final Judgment.

Focusing on whether one spouse had custody of the minor children and the circumstances surrounding the dissolution (who was at fault in the marriage), the State Court seemed most troubled by what the Debtor did to create the situation before it. In both the original and amended final judgments, the State Court emphasized that the Debtor left while the younger of the parties' two children was only two months old to move in with his "paramour" with whom he had a child "out of wedlock." In short, the State Court focused on the fact that the Debtor just walked away and left Ms. Dodson holding the bag—two young children, two jobs, the house

[4] In many states, including Florida, failure to pay alimony or child support may be punishable by contempt. In our case, like in *Cummings*, no court below ever determined whether the payments were enforceable by contempt. *See id.* at 1266 n.1. Although Ms. Dodson moved for contempt against the Debtor, she withdrew that motion and the State Court never ruled on it, making this case distinguishable from *In re Benson*, cited by the Debtor, in which the husband's obligation to pay the mortgage was held not to be a support obligation because it was not enforceable by contempt. *In re Benson*, 441 Fed. App'x. 650 (11th Cir. 2011). Also, in *Benson*, the parties' division of tax exemptions for the children was evidence of support—here, the parties agreed to split tax exemptions for the children, just like they split the mortgage payments.

underwater, the mortgage payments, the furniture and car loans, and all of the other household and child care expenses. By the time of the evidentiary hearing in May of 2010, this situation had continued for twenty-two months. The State Court also placed emphasis on the fact that Ms. Dodson had custody of the couples' young children and that she was far more sensitive to the children's needs than was the Debtor.

The awards by the State Court were clearly to help provide shelter to Ms. Dodson and the young children, did not grossly favor one party over the other, and did not leave one spouse with virtually no income. Although the Debtor disputed the accuracy of Ms. Dodson's State Court financial affidavit at the trial in this Court, the State Court's finding that the parties' incomes were "comparable" in May of 2010 is supported by the record in the State Court.[5] In an effort to prove that Ms. Dodson's income at the time of dissolution was higher than his, at trial before this Court the Debtor introduced seven pay periods' worth of Ms. Dodson's pay stubs from 2009 into evidence. Debtor's counsel walked Ms. Dodson through a lengthy line of questioning, including having her add, subtract, multiply and divide certain numbers on a calculator, in an attempt to prove that Ms. Dodson's income, annualized from the amounts on the seven pay stubs, was substantially higher than what she reported to the State Court. Although some of Ms. Dodson's pay stubs in evidence show higher income than Ms. Dodson reported as her "then" monthly gross income on her State Court financial affidavit (Def.'s Ex. 1), her other pay stubs in evidence show lower income than she reported to the State Court. (Def.'s Ex. 2). The calculations that Ms. Dodson made during cross-examination were speculative at best and, being based on pay stubs from only seven pay-periods, that cross-examination did not overcome Ms. Dodson's credible and unrefuted testimony that her income fluctuated depending on what position she was assigned to and how many hours she worked during any given pay-period. This testimony is

[5] The Record does not reflect whether at trial in the State Court the Debtor contested the amount of income that Ms. Dodson reported on her financial affidavit but if he did, he did not prevail.

substantiated by the pay stubs themselves, which show fluctuating amounts of pay per pay-period, broken down by the type of work Ms. Dodson had performed during each pay-period.

The Debtor also argued at trial that at the time of the dissolution Ms. Dodson had more income from her second job than she showed on her State Court financial affidavit, but he presented no evidence of the amount.[6] Once again, Ms. Dodson's unrefuted testimony on that subject was that she fully reported all of her income on the financial affidavit she filed with the State Court and no evidence introduced at trial was sufficient to conclusively contradict that testimony. [7] Ms. Dodson's trial testimony and pay stubs in evidence, as well as the other evidence discussed below, are consistent with the State Court's finding that the parties "[had] comparable income" at the time of the dissolution.[8]

Even if Ms. Dodson's income at the time of dissolution was more than she reported to the State Court, which she denies, the facts and circumstantial evidence, and inferences reasonably drawn from them, point to Ms. Dodson's need for as much income as she could get under the circumstances. The State Court found that Ms. Dodson:

> [W]orked two jobs at times in order to pay daycare and marital bills. The Wife paid all expenses related to the parties' marital home … When the parties' minor children began daycare, the Wife had to pay all expenses for daycare of $205.00 per week for twenty-two (22) weeks, with no contribution from the Husband.

[6] It is unclear, but it appears that Ms. Dodson's second job was also in nursing, albeit in a different capacity than her main, full time nursing position.

[7] The amounts on the pay stubs, when annualized, shows that *at most* Ms. Dodson's annual gross income could possibly have been $6,519.24 higher than the amount she reported on the financial affidavit she filed in State Court. This is consistent with, Ms. Dodson's testimony that her income from overtime and her second job fluctuated.

[8] Through the various calculations the Debtor had Ms. Dobson perform on cross examination, the Debtor attempted to prove that Ms. Dodson had had about $23,000 in excess income. In closing, the Debtor argued that she had "frittered" that "excess" money away. Neither the evidence before this Court or the State Court support such a finding. In her financial affidavit filed with the State Court dated September 21, 2009, Ms. Dodson reported $3,786.52 in "present" "monthly gross salary or wages." Her pay stubs for September 2009 (pay-periods ending 9/12/09 and 9/26/09) show gross "regular" wages of $3763.69, which is $22.83 *less* than on her financial affidavit. Ms. Dodson reported "monthly bonuses, commissions, allowances, overtime, tips & similar payments" on her financial affidavit at $972.00 and the amounts on her pay stubs for September 2009 show income above "regular" income (overtime, etc.) of $633.33, so it appears that she over-reported this category of income on her financial affidavit by $338.67.

(Final Judgment, Doc. 25-1 at 2). That the State Court found these facts troubling and justification for ordering the Debtor to provide support in the form of half of the mortgage payments is hardly surprising.

The Debtor argues that by requiring him to pay half of the mortgage payments on the parties' home in addition to child support the State Court left him with too little income, especially as compared with his ex-wife. First, this situation is temporary and will end when the house sells or at such other time as a court may determine. Secondly, this argument is belied by the State Court's judgments, which upon finding that the parties' incomes were "comparable," resulted in dividing the parties' other debt virtually evenly. The State Court's Child Support Guidelines Worksheet (Ex. 2, Amended Final Judgment, Doc. 21-3 at 3) shows that had the State Court not ordered the Debtor to pay half of the monthly mortgage payments, Ms. Dodson would have been practically destitute: the Debtor's "Present Net Monthly Income" was listed at $4,163.68 and Ms. Dodson's was listed at $3,883.36. These figures reflected that the Debtor's net annual income was $49,964.16 and Ms. Dodson's was $46,600.32 (confirming the State Court's finding that the parties' had "comparable income"). The State Court split the child support responsibilities virtually evenly, leaving Ms. Dodson to pay more ($1,278.10) than the Debtor ($1,197.90). Subtracting the parties' respective child support obligations from their annual net incomes still left the parties' incomes "comparable;" the Debtor's at $35,589.36, Ms. Dodson's at $31,263.12. The monthly mortgage payment on the marital home was $1,659.00 (Def.'s Ex. 1), or $19,908.00 per year. If the State Court had left Ms. Dodson paying that entire amount, her net annual income would have been reduced to $11,355.12, while the Debtor's would have stayed at $35,589.36. By ordering the Debtor to pay half the mortgage payments, the State Court kept the parties' net annual incomes "comparable:" the Debtor's at $25,635.36, Ms. Dodson's at $21,309.12.

The State Court's award of half of the mortgage payments cannot, under any circumstance, be considered property settlement. As to the house, there was no "property" to divide between the parties because the house had no value over the mortgage and was "under water." (Amended Final Judgment, Doc. 1-2 at 2). Even if the State Court's allocation of the debt on the home constituted "equitable distribution" of debt, rather than of property, the award can still be, and in this case was, in the nature of support. *See Cummings,* 244 F.3d at 1266. The State Court had already divided all of the parties' other property and debts as evenly as possible (H – ($11,363.35); W – ($9,740.38)).[9] There was nothing left for the State Court to "equitably divide" other than the debt on the house.

The Defendant cites *In re Wood,* No. 11-006583-8-JRL, 2012 WL 14270 (Bankr. E.D.N.C. Jan. 4, 2012) in support of his position that his obligations to Ms. Dodson are dischargeable and not "in the nature of support." In *Wood,* a North Carolina bankruptcy court held a debtor's obligation to pay a mortgage was not in the nature of support. *Id.* at *2. *Wood* is distinguishable: the obligation in *Wood* was established by agreement rather than by court order after a contested hearing; the opinion does not discuss whether there was equity in the property to which the mortgage debt was attached; and the former wife in *Wood* "did not present any evidence" that the parties intended the debtor's obligations to be in lieu of alimony. *Id.* In the trial before this Court, the Wife's testimony was that the Debtor's obligation to pay half of the mortgage payments was to help keep a roof over her head and those of their children; the Debtor presented no evidence to the contrary. In *Wood,* both parties "forever [gave] up any right to spousal support." *Id.* Here there was no such waiver; in fact, Ms. Dodson asked the State Court to enforce the Debtor's failure to pay the one-half mortgage payments by contempt but later withdrew that request upon the parties' agreement on other matters.

[9] Ex. 3, Final Judgment, Doc. 25-1 at 17.

The Defendant's argument that the State Court has already determined dischargeability of its awards is without merit. The record is totally devoid of any evidence that the State Court ever considered dischargeability of debt under the Bankruptcy Code.

In *Cummings,* the Eleventh Circuit instructed the bankruptcy court to determine how much of an award to a former spouse was "in the nature of support" and therefore non-dischargeable. *Cummings*, 244 F.3d at 1267. Here there are two awards: one is the past due sum of $30,730.57 and the other is the one-half monthly mortgage payments since June 1, 2010. Using the Eleventh Circuit's standard in *Cummings*, and considering all of the testimony and evidence, this Court concludes that the State Court's intent in ordering the Debtor to pay Ms. Dodson half of the mortgage payments until the house sold was to force the Debtor to help provide a roof over the heads of the Plaintiff and their two young children, which he had not done through the date of the dissolution. *See In re Johnson*, 397 B.R. 289, 299 (Bankr. M.D.N.C. 2008) ("[A]n obligation that enables one's family to maintain shelter is in the nature of support. . . .").[10] At trial Ms. Dodson testified that she is now a debtor in her own Chapter 13 case and is attempting to refinance the mortgage on and keep the home. It is unclear whether Ms. Dodson is keeping the home because she wants to or because she was unable to sell it. Because the State Court intended the Debtor's obligation to continue making one half of the mortgage payments on the home to be temporary until the home sold, further proceedings are necessary for a determination as to when this obligation should end.

CONCLUSION

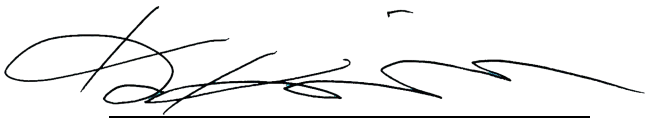
Having observed the demeanor of the witnesses and taken all evidence and the entire Record into consideration, this Court concludes that the Plaintiff has met the burden of demonstrating by a preponderance of the evidence that the State Court's award of $30,730.57,

[10] The court in *Johnson* found that the former wife could not afford the house on her own. *Id.* at 298. Neither could the Plaintiff here without working two jobs.

constituting half of the mortgage payments during the parties' separation, and the Debtor's continuing obligation to pay half of the monthly mortgage payments from June 1, 2010 to a date certain, are "in the nature of support" and therefore non-dischargeable in Chapter 13 under 11 U.S.C. § 523(a)(5). Because this Court and the State Court have concurrent jurisdiction over dischargeability of marital obligations, the parties may ask this Court or the State Court to determine an end date for the Debtor's obligation to make the one-half mortgage payments from and after June 1, 2010.

This Court will enter a final judgment consistent with this Opinion.

DONE and ORDERED in Tallahassee, Florida this April 8, 2013.



KAREN K. SPECIE
United States Bankruptcy Judge

cc: All interested parties